

Finally, the Commission must ensure that the requirements of special needs populations are also met by the definition of special services. The foregoing definition is broad enough to accommodate the requirements of such technologies as TTY and TDD, but the Commission should consider whether the terminal equipment and services associated with those and successor technologies should be incorporated into the definition of special services.

B. The Definition of Special Services Should Evolve over Time and Should Be Technologically Neutral.

Section 254(c)(1) defines universal service as an evolving level of service, and the definition of special services should also evolve over time. Otherwise, schools will again find themselves unable to provide students with the level of technology training they require. As noted above, the cutting edge will continue to advance, and the de facto standard will advance with it, although always somewhat behind. Thus, the Commission and the Joint Board must periodically reexamine the standard as telecommunications technology evolves. We propose that the standard be reviewed and, if necessary, revised, every four years.

In addition, the Commission should not impose particular technological solutions. As telecommunications technology advances and competition develops among telecommunications providers, different approaches and opportunities will arise. Libraries and schools are primarily concerned with the ability to meet the needs of patrons, students, teachers and other stakeholders, not with favoring particular technologies. It makes no difference to an educational institution whether its traffic is carried by a cable operator or a wireless carrier, so long as it can perform its

mission. Schools and libraries are also aware of the need for any solution to be economically feasible, and such factors as geographic location obviously will affect what technological solution is the most cost effective. Consequently, the definition of special services should emphasize capabilities or functionalities, rather than technology-specific solutions, such as ISDN service or T-1 service.

C. Introducing Advanced Technology Nation-Wide Will Be a Gradual Process.

A broad definition of special services will encourage the gradual development of advanced telecommunications in schools and libraries. There will not be a rush to spend as much money as possible, for three reasons. First, not all schools and libraries may need or want all covered services, or the highest level of those they do want. Creating incentives for economically rational behavior, as discussed above, will hold costs down. Second, many will not be able to take advantage of the provisions of the 1996 Act until they address other infrastructure deficiencies.¹³ Third, schools and libraries will have to find funding for hardware not included in the definition of special services before they can take advantage of most special services.

Thus, although adopting a broad definition of special services will aid library and school networks, it will do so at no risk to the solvency of the universal service fund.

¹³ For instance, many schools will have to upgrade electrical wiring and air conditioning just to run any new telecommunications and computer equipment. GAO Report at 12-13. As much as \$112 billion may be needed to repair facilities to meet all applicable health and safety regulations and allow for the full use of the new technology. *Id.* at 1. These costs would not be funded out of the universal service fund.

V. THE PROPOSED PRICING MECHANISM FOR "SPECIAL SERVICES."

The 1996 Act does not specify how the rate for special services is to be calculated. The legislative history gives the Commission considerable flexibility in this regard.¹⁴ We propose a method that is based on the competitive market price or a surrogate for the competitive market price for each service (if no such price is readily ascertainable), and then provides for a discount from the competitive market price to a level that will ensure affordability to the large majority of schools and libraries. We further propose to allow the carrier, at such time as sufficient data is available, to establish a floor for the rate for a particular service at the Total Service Long-Run Incremental Cost (TSLRIC) of providing that service. Finally, to ensure that the goals of the legislation are met, we also propose an additional lifeline subsidy to schools and libraries in very poor areas.

A. The Rate for Special Services Should Be Based on a Market Rate.

The price of special services should follow this general rule: The price paid by a school or library should not exceed the least of (i) the carrier's present-day rate or current bid, (ii) the lowest price "charged for similar services to other parties," or (iii) a market-based price, discounted to assure affordability.

The general rule ensures that service providers cannot use the benchmark rate as an excuse to raise rates if they are already offering or have negotiated lower rates.

¹⁴ Incremental cost was the only standard reported by the Senate Committee. When the term "discount" was introduced, Senator Snowe explained that the change was intended to offer more flexibility to ensure affordability. 141 Cong. Rec. S 7984 (June 1995) (daily ed.).

For example, many local governments have negotiated cable franchise agreements that require the cable operator to provide free broadband connections to schools, libraries, and government offices for telecommunications purposes. Schools and libraries that are already receiving the benefit of such facilities should not be forced to pay for the service simply because the Commission has established a rate mechanism for those communities that do not already have the capability.

B. A Benchmark Price Based on Prices Where Effective Competition Exists May Be Used as a Surrogate for the Competitive Market Price.

We propose that, as the initial method of setting rates, the Joint Board consider a benchmark based on prices where there is competition, discounted to ensure affordability. Such a discounted price would also have the effect of absorbing a reasonable share of joint and common costs. Under this method, rates for special services in competitive markets would be used as surrogates for the actual market price. One method of establishing the benchmark could be by looking at average costs for bids in areas that have effective competition (such as large suburban school districts) and calculating a national median price. For services that are commercially available in competitive markets but not now widely used by schools and libraries, the national median commercial rate may also be a reasonable surrogate for the competitive price.

Once the benchmark price has been computed, it will be further reduced by the Commission for interstate services and by the state regulatory body for intrastate services as necessary to make the price affordable. The standard for affordability should be that single price that would permit use of the service by 95% of the

potential user community. This discount is large enough to ensure that schools and libraries in most rural, insular and high cost areas will be able to afford service. The corresponding regulatory body would gather data based on current prices being paid by schools and libraries to establish a demand curve for each special service. As systems subscribe to each service, the data would be refined and the price point recalculated at regular intervals. Carriers would have the opportunity to demonstrate to the regulating body that the incremental cost of providing the service exceeded the discounted rate. The carrier would be compensated for any such difference between the 95% affordability price point and the carrier's TSLRIC, out of the universal service fund.

Rates in each area would be set after comparing bids received by the contracting agency to the competitive benchmark. If there is effective competition in a bidding area, the winning bid would be compared to the discounted national benchmark rate. If the competitively bid rate exceeds the discounted rate, the provider will be required to lower its price to the discounted rate. If the bid price is lower than the discounted rate, then the bid price will apply, under the general rule described above.

In areas where there is no effective competition, the discounted price should be based directly on the competitive benchmark for each service and basic service element. Any school district or library facing "above-discounted-benchmark" costs will get the service at the national benchmark price, less the discount.

C. The Total Service Long Run Incremental Cost May Be Used as a Floor Under the Discounted Rate, if the Carrier Presents Sufficient Data.

As an alternative to the competitive benchmark rate, the Commission should adopt the TSLRIC, which is discussed in more detail in separate comments filed by the American Library Association. Under this method, the provider's TSLRIC for each service would be substituted for the discounted national competitive benchmark, provided that there was sufficient information to calculate the TSLRIC and agreement on what should be included in TSLRIC. Thus, providers would submit their TSLRIC's for each service as bids and the low bidder would receive the right to serve the bidding area, subject to the conditions discussed below.

D. Providers of Special Services Should be Selected on the Basis of Competitive Bids.

Under both approaches, the provider of universal service in an area would be selected through a bidding process. Prospective service providers would submit bids to school and library districts upon the request of the contracting officer for each district, issued in accordance with local contracting procedures. Issuance of a request for proposals or any equivalent mechanism permitted by state or local law would constitute a bona fide request. Districts should also have the authority to aggregate demand by forming consortia with other eligible entities.

To permit the contracting agency to compare bids, bidders would be required to submit unbundled rates for individual services, or rates for service packages accompanied by a cost allocation showing the costs corresponding to each service in the package.

Bids would be reviewed by the requesting entity or entities, again in accordance with local contracting procedures. The low bidder would receive the right to serve schools and libraries in that region at the discounted rate. If, however, the contracting agency had reason to reject the low bid on grounds permitted by its local procedures -- such as a past record of poor service -- the contracting agency could select a different service provider. To encourage low bidding by service providers, however, only the lowest qualified bidder would have the right to compensation from the universal service fund.

E. Under Either Rate Proposal, a "Safety Net" for Poor Schools and Libraries Would Reduce the Discounted Price Further To Ensure Affordability for All.

It is possible in some cases that even the discounted benchmark price or the TSLRIC rate will be too high for a very poor school district or library to be able to pay. In such cases, we propose an additional lifeline subsidy to ensure that all schools and libraries can afford special services.

The determination of which school and library districts are eligible for a lifeline subsidy would be based on family income in each school district, as determined by the Census Bureau, or some other appropriate state or federal formula. As a rough approximation, the Census data corresponds to the tax base available to support a school or library district's investment in telecommunications facilities. The lifeline subsidy would be available to schools and libraries situated within districts that are in the bottom 25% of all school districts, ranked according to median family income. In other words, the lifeline subsidy would be available to schools and libraries serving

the poorest 25% of the population. The amount of the subsidy would be proportional to the amount by which the average income in the district falls below the national average, so that an area with only 25% of the national average income would pay only 25% of the discounted price. Because this subsidy will probably benefit particular compact areas, the subsidy would come out of the federal fund, and not any state mechanism.

F. Sharing of Facilities with Noneducational Users.

The Commission should not take any action that would significantly restrict sharing of facilities. So long as a facility is being used primarily for educational purposes, it should be deemed to meet the requirements of the 1996 Act. Otherwise, innovative uses of technology and enhanced roles for schools and libraries could be stifled. Schools and libraries should remain free to share their networks with other entities in the community, and schools and libraries should not be prohibited from charging lab fees or user fees to defray expenses related to the use of a network.

VI. THE JOINT BOARD SHOULD RECOMMEND REGULATORY MEASURES TO ENHANCE ACCESS TO ADVANCED SERVICES.

Subsection 254(h)(2) of the 1996 Act requires the Commission to adopt rules to enhance access to advanced telecommunications and information services for school classrooms and libraries, and defining the circumstances under which carriers may be required to connect their networks to such users.

To the extent not already included as special services, the Commission should encourage development of two-way interactive video services or Internet services over dedicated facilities to or for schools. The Commission can enhance access by

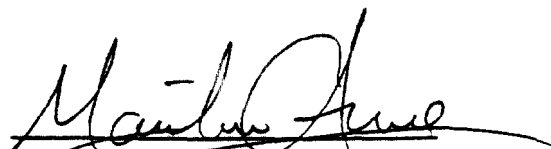
adopting appropriate pricing policies. Such policies could include marginal-cost pricing of transmission usage to access information services providers, postalized inter-city rates, and flat-rate service, in addition to implementation of Section 271(g)(2).

Other regulatory policies that should be considered to ensure access to services are requiring the unbundling of services to allow easier aggregation of service by school and library consortia, and mandating service by one or more local providers if nobody bids on a request for proposals issued by an eligible entity.

Conclusion

For the foregoing reasons, the joint commenters urge the Joint Board to recommend that the Commission adopt rules ensuring that all eligible schools and libraries have access to the broadest permissible range of services, at prices that will deliver the benefits of advanced telecommunications technology nationwide.

Respectfully submitted,


Nicholas P. Miller
William Malone
Matthew C. Ames

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
1225 Nineteenth Street, N.W.
Suite 400
Washington, D.C. 20036-2420
Telephone: (202) 785-0600
Fax: (202) 785-1234

Attorneys for the Joint Commenters

April 10, 1996
WAFS1\44304.3\107496-00001